No. 06-48

MAR 30 2006

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In The
Supreme Court of the United States

SOO KYANG KIM,

Petitioner,

v.

ALBERTO R. GONZALES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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Questions Presented

I. WHETHER INEFFECTIVE COUNSEL CAN CONSTITUTE EXTRAORDINARY CIRCUMSTANCES, GIVEN THE VARIOUS CONFLICTING GUIDELINES BY CIRCUIT COURT DECISIONS, AND AS SUCH ARE GROUNDS FOR REOPENING REMOVAL PROCEEDINGS UNDER THE IMMIGRATION AND NATIONALITY ACT, SECTION 240(b)(5)(C) OF 8 U.S.C.A. 1229(b)(5)(C).

WHETHER PETITIONER'S LACK OF NOTICE IS SUFFICIENT REASON TO REOPEN REMOVAL PROCEEDINGS, UNDER 8 U.S.C.A. 1229(b)(5)(C), OR IT VIOLATES HER DUE PROCESS RIGHTS UNDER THE 5TH AMDENDMENT

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Opinions Below

On April 22, 2003, the immigration judge ordered the Petitioner removed *in absentia* for failure to appear at the hearing for removal. On May 21, 2003, the present attorney filed a motion to reopen with the immigration court in Baltimore, Maryland based on the grounds that exceptional circumstances existed. The motion to reopen was denied by the immigration court on March 15, 2004. On April 12, 2004, present attorney filed an appeal on order to deny the motion to reopen, based on exceptional circumstances that existed and a lack of rational basis for the denial order. The appeal was denied on April 22, 2005. Petitioner sought review with the 4th Circuit Court of Appeals; the Petition for Review was denied in an unpublished opinion on December 30, 2005.

Jurisdiction

A timely Petition for Review was denied by the United States Court of Appeals on December 30, 2005. (App. 2) An extension of time to file the Petition for Writ of Certiorari was granted to and including July 10, 2006, on May 11, 2006, in application No. USAP 05-1546. The jurisdiction of the Court invoked under 28 U.S.C. section 1254(1).

Constitutional and Statutory Provisions Involved

8 U.S.C. § 1252

8 U.S.C. § 1229

8 C.F.R. § 1103.3

8 C.F.R. § 1003.26

8 C.F.R. § 292.5

U.S. Constitution, 5th Amendment

Statement of the Case

Petitioner, SOO KYANG KIM, is a native and citizen of South Korea. She entered the United States in Chicago, Illinois on or about November 13, 2001 on a non-immigrant visitor Visa. Soon after entering the United States on her visa, she met an American citizen by the name of Brandon Lee. A short time later, in 2002, Petitioner and Mr. Lee were married. On May 8, 2002, the government began removal proceedings against Petitioner. The initial notice to appear was served personally on Petitioner.

The first hearing was scheduled for May 21, 2002 and held at the immigration court in York, Pennsylvania. Petitioner dutifully appeared at this hearing even though she was given a mere five days notice. Subsequent hearings were also held at the immigration court located in Baltimore, Maryland.

In total, four hearings were held on September 10, 2002, November 26, 2002, March 18, 2003 and April 22, 2003. All notices for these hearings were sent to Petitioner's attorney Dusic Kwak. Petitioner appeared at every hearing prior to the hearing scheduled for April 22, 2003.

When she failed to appear, she was removed *in absentia* on April 22, 2003. Her failure to appear was due to extraordinary circumstances; Petitioner failed to receive notice of her request for appearance. Petitioner's attorney informed Petitioner and her husband that an appeal was pending with the Board of Immigration Appeals regarding the denial of an I-130 appeal (That appeal was filed on February 10, 2003, prior to the hearing scheduled in the immigration court in Baltimore, Maryland). Petitioner and her husband understood from Mr. Kwak that because an appeal was pending, the Petitioner did no have to appear in court until the appeal was decided. Therefore, It was not necessary to appear in court on April 22, 2003. Petitioner's attorney, Mr. Kwak, never informed Petitioner of the notice to appear at that hearing, nor did he clarify the necessity to appear, regardless of the appeal on the I-130 issue. (see App. pp. 27 & 18) Had Petitioner understood that the information from her attorney was incorrect, she would have appeared at the hearing, like she did every prior hearing.

Furthermore, Mr. Kwak did appear at that April 22, 2003 hearing, He made no attempt to contact Petitioner or her Husband any time prior to confirm she would appear. This is not the first time Mr. Kwak mismanaged Petitioner's case. On June

30, 2003, he inappropriately filed a visa petition on behalf of Petitioner, when 8 C.F.R. 1103.3 (a)(1)(iii)(B) dictates that Petitioner must do it herself. Then again, on July 14, 2003, Mr. Kwak inappropriately filed his motion to withdraw as petitioner's Attorney with the Executive Office of Immigration Review; his letter was rejected because the papers should have been filed with the Appeals Board (see App. pp. 15-17). In summary, Mr. Kwak, at that time still Petitioner's representing attorney, was not even aware of the Appeal or the Appeals process. Given the totality of circumstances, even though Petitioner did not allege ineffective counsel, it does not negate the fact that there was indeed ineffective counsel. It should also be noted that petitioner is South Korean, and it is custom to give deference to men of position like an attorney (Mr. Kwak is also South Korean); hence, Petitioner was reluctant to testify to her ineffective counsel.

Upon review of the extraordinary circumstances – lack of notice and infective counsel – Petitioner feels the Board of Immigrations decision to uphold the *in absentia* removal lacked Rational Basis – and violated her Due Process Rights under the 5th Amendment of the United States Constitution.

Reasons for Granting the Writ

I. INEFFECTIVE COUNSEL CAN CONSTITUTE EXTRAORDINARY CIRCUMSTANCES, GIVEN THE VARIOUS CONFLICTING GUIDELINES BY CIRCUIT COURT DECISIONS, AND AS SUCH, ARE GROUNDS FOR REOPENING REMOVAL PROCEEDINGS UNDER THE IMMIGRATION AND NATIONALITY ACT SECTION 240(b)(5)(C), OF 8 U.S.C.A. SECTION 1229(b)(5)(C).

In re Gustavo Alonzo Grijalva-Barrera, I&N Dec. 3284 (BIA 1996), and In re Cecillia Rivera-Claros, I&N Dec. 3296 (BIA 1996), the Board wrote that ineffective counsel can constitute extraordinary circumstances, as defined under the Immigration and Nationality act Section 240(b)(5)(C). This was affirmed again In re N-K & V-S, I&N Dec. 3312 (BIA 1997). All 3 decisions quoted the *Lozada Requirements* – set forth in Matter of Lozada, I&N Dec. 637 (BIA 1988); *aff'd*, 857 F.2d 10 (1st Cir. 1988) – as the standard by which ineffective counsel is tantamount to extraordinary circumstances.

This is more recently re-affirmed in Tang v. Ashcroft, 354 F.3d 1192 (10th Cir 2003), where, in deciding if Mr. Tang met the *Lozada* Requirements, the majority ruled "... that an Attorney's deficient performance can amount to exceptional circumstances under Section 1229a(e)(1) sufficient to reopen removal proceedings pursuant to Section 1229a(b)(5)(C)(i), Mr. Tang's petition fails because he failed to comply with the BIA requirements of

ineffective counsel in Fong Yang Lo." (citing Fong Yang Lo v. Ashcroft, 341 F.3d 934, 936 (9th Cir. 2003).

The First requirement is that (1) the motion – to reopen based on ineffective counsel via extraordinary circumstances - be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard. The Second is that (2) counsel shoes integrity or competence is being impugned by informed of the allegations leveled against him and be given an opportunity to respond. The third is (3) the motion reflect whether a complaint has been filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not.

With respect to the Third Requirement, the 4th Circuit of Appeals, in Figeroa v. U.S. I&NS, 886 F.2d 76 (4th Cir. 1988) "failed to see how this indicates that ...representation was effective. In Figeroa, the alien spoke no English and had limited education. The Court reasoned that he was "no doubt unaware of any action he might be able to take" against his counsel. "such as filing either a complaint with the state bar or a legal malpractice claim, Id. at 79. This is exactly the same predicament as petitioner here. Mrs. Kim is of limited education and speaks little to no English. She would not be aware of any action she should take against her ineffective counsel.

We agree with the Fourth Circuit, in failing to see how this indicates representation was effective. The facts of the case itself are *prima facie* evidence of ineffective counsel, whether or not a complaint has been reported to the local state bar. As stipulated, Mr. Kwak never properly informed his client Kim of the need to appear at the April 22, 2003 hearing. Prior to this, counsel, on June 30, 2003, inappropriately filed a visa petition on behalf of Kim, when 8 C.F.R. 1103.3(a)(l)(iii)(B) dictates that Petitioner must do it herself (see Appendix p. 136). Then again, on July 14, 2003, Mr. Kwak Inappropriately filed his motion to withdraw as Petitioner's attorney with the Executive Office of Immigration Review; his letter was rejected because the papers should have been filed with the Appeals Board (see App. p. 15-17). In summary, Mr. Kwak, was, at that time, still Petitioner's representing attorney, yet was not even aware of the Appeal or the Appeals process.

With respect to the First Requirement, petitioner did not specifically file a motion alleging ineffective counsel. However, she did submit a sworn affidavit stating her reason for failure to appear – that her counsel was unclear as to whether she had to go to the hearing with the I-130 petition still before the BIA. In Ghounam v. U.S., 378 F.3d 740, 745 (8th Cir. 2004), the Court ruled that the fact that a respondent appeared at all the hearings held prior to the missed hearing that led to an in absentia removal, is sufficient factually information to allow a sworn affidavit from respondent stating her reason for failing to appear. Mrs. Kim fulfilled this requirement. She submitted her affidavit. She had

been present at every hearing before the immigration court prior to the April 22, 2003 one. Therefore, Mrs. Kim's affidavit stating her reason for failure to appear should have been sufficient grounds for the Board to reopen her removal proceedings (see App. p. 18). Their failure to do so is irrational, without sufficiently stated reason, and too conclusory; the Board blindly applied the Lozada Requirements without looking at the totality of the circumstances and facts in this case.

Following the Fourth Circuit's logic in Figeroa, with respect to the Third Requirement, the same logic can be applied to the First: the failure to file a motion specifically alleging ineffective counsel, does not necessarily indicate whether counsel was indeed effective or not. Mrs. Kim spoke little to no English, and was not aware of this necessity Furthermore, as stated, it should also be noted that petitioner is South Korean, and it is custom to give deference to men of position like an attorney (Mr. Kwak is also South Korean); hence, Petitioner was reluctant to testify to her infective counsel as well. Hence, per Ghounam, Mrs. Kim's sworn statement, and *prima facie* evidence that she appeared before all prior hearings before this one in question should have been taken into consideration by the Board, and her removal proceedings reopened.

Finally, with respect to the Second Requirement of Lozada in Denko v. U.S., 351 F.3d 717 (6th Cir. 2003), the court ruled that the immigration judge improperly reasoned that respondent was not entitled to reopen her proceedings solely because she failed to submit an

affidavit from her prior attorney. Again, following the logic of Figeroa, the failure of the submission itself is not necessarily entirely indicative of whether there was ineffective counsel or not. The facts clearly show ineffective counsel. Mrs. Kim spoke little to no English and was not aware of the requirement. Even if she was, or later did become aware, Korean custom would inhibit her alleging ineffective counsel – and notifying her previous counsel of such. Given the totality of circumstances, the Board should have taken this into consideration in their ruling.

In Fong Yang v. Ashcroft, that majority went on to say "Several circuits do not require strict compliance with Lozada Requirements", Id. at 937, 938. The Court discussed the necessity of flexibility in *Lozada* analysis to ensure proper assessment of infective assistance claims, discourage meritless claims, and hold Attorneys to appropriate standards of performance, Id. at 937 N.4)

In Xu Yong Lu, 259 F.3d 127 (3rd Cir. 2001), the Court warned against the dangers of applying *Lozada* too strictly, Id at 133. This Court also echoed similar sentiments in Figeroa v. U.S. I&NS, 886 F.2d 76 (4th Cir. 1988) (see Petitioners Brief, App. p. 10, finding whether or not a complaint has been filed against poor counsel with appropriate disciplinary authorities "fails to see how this indicates that...representation was effective.")

Furthermore, in Singh v. INS, 213 F.3d 1050, 1052 (9th Cir. 2000), the court said one must look to the "particularized facts present in each case" in determining whether petitioner has established

exceptional circumstances. In Contra Singh v. INS, 295 F.3d 1037, 1040 (9th Cir. 2002), the Court found petitioner Singh had "diligently appeared for all previous hearings", and "had no reason to delay the hearing after the culmination of years of efforts to obtain permanent status". The Court went on to rule that Singh's misunderstanding of the time of the hearing constituted exceptional circumstances, based on the prima facie evidence of the case (e.g. – attended every hearing prior).

The same spirit of these cases guide here. Petitioner Kim has met the requirements of *Lozada* (see Petitioner's Brief, App. pp. 10-14). She had attended all previous hearings before the missed hearing on April 22, 2003, dating back one year. She submitted the proper affidavit explaining her reason why she failed to appear (see Ghounam v. U.S., 378 F.3d 740, 745 (8th Cir. 2004), where the Court ruled where a respondent appears at every prior hearing, it's factually sufficient to allow a sworn affidavit stating reason for failing to appear. See also Petitioner's Brief, App. pp. 10-14 and App. pp. 18-19). She had too much to lose by failing to appear for the hearing, and after a culmination of one years worth of hearings, would simply not just show up for one. If not for the bad advice of her counsel, Mrs. Kim would have appeared for the April 22, 2003 hearing. The Court echoed this sentiment in Romano-Morales v. INS, 25 F.3d 125, 129 (2d Cir. 1994), where the Court ruled an Alien's good faith reliance on counsel...could contribute to a finding that extraordinary circumstances exists.

The *Romano* Court went on to state that Rules regarding in Absentia hearings should be carefully applied to avoid conflict with statutory or constitutional rights, Id. at 129. Hence, while there may be a desire in "bringing litigation to a close" and avoid delays, where "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States", these rulings here are to ensure basic rights are not infringed in the name of quick justice. Romano-Morales v. INS, 25 F.3d 125, 129 (2d Cir. 1994). The Court in Sharma v. INS, 89 F.3d 545 (9th Cir. 1996) agreed abuse of discretion by the BIA is a proper standard of review. In re S-A-, 21 I&N Dec. 1050 (BIA 1997), Board Member Lory Rosenberg went on to say, "Although it may appear that I am being facetious or positing an absurd extreme in some of the extrapolates I have made concerning the quality and quantity of evidence one should anticipate will be required by majority to reopen a removal conducted in absentia, ... I am deadly serious. The right to a hearing and an opportunity to be heard is among the most precious rights enjoyed in a democracy such as ours. It should not be sacrificed inadvertently because of lack of Representation, *poor Representation*, or underestimation of the requirements necessary to secure such a right, *Id* at 1057.

Petitioner Kim would have attended the hearing. She is an average layperson who speaks little English. It is not unreasonable to believe she would follow her Attorney's advice in whether to attend the hearing or not. Furthermore, Both her counsel and Mrs. Kim are of Korean descent, so there was a greater trust to believe what her counsel

had to say. Her counsel's confusion over the hearing, and the whole appeals process, constitutes ineffective counsel given the totality of the circumstances particularized in this case.

In addition to the Lozada Requirements, the Board in N-K & V-S stipulated that if ineffective counsel was so fundamentally unfair that the alien was prevented from reasonably presenting his case, it is considered a denial of Due Process. Id. at 880. The alien must also show that she was prejudiced by her representative's performance. Matter of Lozada, supra at 638. This is obvious in the present case: if it were not for counsel Mr. Kwak's failure to properly notify his client Mrs. Kim of the hearings, Mrs. Kim would not have been deported in absentia. Mrs. Kim was prevented from reasonably presenting her case to be allowed to stay in the United States, and was prejudiced from doing so by her counsel because she was declared removed *in absentia* due to her failure to show at one of her proceedings to present such case.

II. PETITIONER'S LACK OF NOTICE IS SUFFICIENT REASON TO REOPEN REMOVAL PROCEEDINGS, UNDER 8 U.S.C.A. SECTION 1229(b)(5)(C), AND VIOLATES HER DUE PROCESS RIGHTS UNDER THE 5TH AMENDMENT.

Pursuant to the Immigration and Nationality Act, Section 240(b)(5)(C), an In absentia order of removal may be rescinded only upon a motion to reopen filed within 180 days after the order of removal has been filed – via 8 U.S.C.A. §

1229(b)(5)(C). Petitioner's motion to reopen was timely. In order for the motion to reopen to be successful, the Petitioner must show that their failure to appear occurred because of "exceptional circumstances", or that the alien did not receive notice, was in federal custody or that the failure to appear was through no fault of the alien. Id. The Immigration And Nationality Act Section 240(e)(1) defines "exceptional circumstances" as circumstances that are beyond the control of the alien. 8 U.S.C.A. § 1229(e)(1).

Although 8 C.F.R. § 292.5(a) & § 1003.26(c)(2) state notice to an alien's counsel constitutes notice to the alien, Petitioner argues her previous attorney, Mr. Kwak, did not give her notice that was served upon him for the request to appear for the April 22, 2003 hearing (see also Matter of Baracio, I&N Dec. 255 (BIA 1985)). As stipulated, Petitioner's attorney informed Petitioner and her husband that an appeal was pending with the Board of Immigration Appeals regarding the denial of an I-130 appeal. Petitioner and her husband understood from Mr. Kwak that because an appeal was pending, the Petitioner did not have to appear in court until the appeal was decided. Therefore it was not necessary to appear in court on April 22, 2003. Petitioner's Attorney, Mr. Kwak, never specifically informed Petitioner of the to appear at that hearing, nor did he clarify the necessity to appear, regardless of the appeal on the I-130 issue. According to the transcripts of the Removal hearings prior to April 22, 2003, Mr. Kwak was actually still confused as to whether Petitioner had to appear for further hearings (see appendix pp. 64-90); had Petitioner understood that the

information from her attorney was incorrect, she would have appeared at the hearing, like she did every prior hearing.

In Chete Juarez v. Ashcroft, 376 F.3d 944, the respondent was ordered removed *in absentia* because she failed to appear at a hearing reconsidering an application. Like Petitioner Mrs. Kim, respondent in Chete Juarez had appeared for every scheduled hearing, except the last for which she received no notice.

Furthermore, the court in Chete Juarez even stated "a motion to reopen may be supported by exceptional circumstances even where the petitioner missed her hearing because of unexceptional circumstances, for instance, misunderstanding the scheduled time of her hearing" Id. at 946 In this case, Petitioner was never directly told by Mr. Kwak that she had to appear on April 22, 2003. Mr. Kwak had informed petitioner that the I-130 visa request was still under appeal, and like Chete Juarez, petitioner was not specifically told – and consequently misunderstood her need to appear on April 22, 2003.

Petitioner does not argue that Notice was not properly served on Petitioner's counsel. However, Petitioner does argue that she failed to receive proper notice by her counsel. (see Joint Appendix, pp 118-119). The failure to apprise his client of the need to attend the hearings is one element of a totality of circumstances constituting ineffective counsel, and, as such, violates the 5th Amendment.

In Matter of W-F, 21 I&N Dec. 503 (BIA 1996), the Board cited H.R. conf. Rep. No. 955, 101st Con. 2d Sess. 132 (1990), whom wrote "the conferees expect that in determining whether an alien's failure to appear was justifiable, the Attorney General will look at the totality of the circumstances to determine whether the alien could not reasonably expected to appear."

Petitioner's counsel told her husband they did not have to appear at the April 22, 2003 meeting (in Chete Juarez, and Singh, both courts found exceptional circumstances in misunderstanding hearing times). At that hearing, Counsel told the IJ that "there was every indication they (e.g. – Kim and Husband) would show" (see App. pp. 20-26). However, this is vague at best. Why did counsel not say "I told them to show", or that they "told me they would be here? " That would be more indicative of no misunderstanding. Counsel then went on to explain that he wrote and called Kim to find her whereabouts, but no such letter exists in the record. Kim would not have needed to contact him earlier, because when they spoke it was no emergency; he told them they would not have to appear. After learning of the in Absentia ruling, it was only three weeks later that petitioner found new counsel (without trying to offend previous counsel, and both are Korean and custom dictates deference to men in such positions) and made motion to reopen her proceeding. The fact Kim attended all prior hearings and retained new counsel quickly illustrates prima facie that she would have attended the hearing but for lack of proper notice from her counsel.

While it is true counsel was told in the previous hearing the court would not delay pending the I-130 decision outcome, counsel was still confused about the entire matter. This in itself is not uncommon; in the Matter of M-S-, 22 I&N Dec. 349 (BIA 1998), the board ruled, even though there was oral warning about missing a hearing, like this case, that if a form of relief was unavailable at the time of the Absentia decision, one can have the ruling re-opened. In the present case, at the time of the Removal proceedings and consequential in absentia ruling, the availability of possible Adjustment of Status (e.g. – the I-130 decision) was still pending, and not yet available as a form of relief. Hence, there is a reasonable belief as to why counsel was still confused about whether his client had to attend the April 22, 2003 hearing, but nonetheless, he should have told his client to be at the meeting. Even if Petitioner was told orally in the previous meeting of danger of not attending, her trust in her Korean Attorney, and as a normal layperson with limited English and knowledge of our Court system is ample reason to believe she would trust her attorney's advice.

In Tang v. Ashcroft, 354 F.3d 1192 (10th Cir 2003), the majority cited Osei v. INS, 305 F.3d 1205, 1208, whom wrote "this Court has recognized that the Fifth Amendment guarantees aliens subject to deportation the right to a fundamentally fair proceeding." The majority in Tang went on to say, "Accordingly, Mr. Tang can state a Fifth Amendment violation if he proves retained counsel was ineffective, and, as a result, was denied a fundamentally fair proceeding," Id. at 1195.

Kim was denied a "fundamentally fair proceeding" by her lack of notice because of ineffective counsel. If it were not for her attorney's advice, she would have not been subject to the in Absentia ruling.

Under 8 C.F.R. Section 3, Immigration Judges have discretion in ordering removals in Absentia. A judge can even order mere voluntary departure if documentation is enough to show it's warranted, without respondent even being there (see Matter of W-F). Given the totality of Circumstances in this case (e.g. – Ineffective counsel, lack of notice, prima facie attendance of all previous hearings and subsequent quickness to get new counsel) – and the fact Kim was never a danger to flee, or was she convicted of any serious crime. (She was caught working when all she had was a Visitor's VISA [see Joint Appendix p 9]) - the IJ abused her discretion by blindly ruling for removal in Absentia without looking at the particularized facts of the case.

As stated, petitioner appeared at every hearing prior. Because of lack of notice, petitioner did not appear at the April 22, 2003 hearing, and did not get a chance to adequately represent herself. As a result, petitioner's Due Process Rights were infringed, and the Board's decision should be overturned.

Conclusion

Petitioner SOO KYANG KIM seeks to have the Board of Immigration Appeals decision reversed. The Board's decision lacked sufficient rational basis

and was too conclusory. The alleged ineffective assistance of counsel rises to the level of a due process violation, presents a mixed question of law and fact, and is therefore subject to *de novo* review, U.S. v. McConney, 728 F.2d 1195, 1202-03 (9th Cir. 1984); the facts show Mrs. Kim was a victim of ineffective counsel, and, given the various conflicting circuit court decisions on the matter, meets the applicable extraordinary circumstance under 8 U.S.C. § 1229a(b)(5),240(b)(5) to explain her failure to appear before the April 22, 2003 hearing. As such, she failed to receive proper notice of the hearing, whereby violating her Due Process rights under the 5th Amendment of the U.S. Constitution.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 05-1546
A79-729-173

SOO KYANG KIM

Petitioner

v.

ALBERTO R. GONZALES,
Attorney General

Respondent

M A N D A T E

The judgment of this Court, entered 12/30/05, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued herewith and constitute the mandate of this Court.

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[ENTERED: DECEMBER 30, 2005]

No. 05-1546

SOO KYANG KIM,

Petitioner,

Versus

ALBERTO R. GONZALES, Attorney General,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. (A79-729-173)

Submitted: December 12, 2005
Decided: December 30, 2005

Before LUTTIG, WILLIAMS, and TRAXLER, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Lawrence S. Kerben, Kew Gardens, New York, for Petitioner. Peter D. Keisler, Assistant Attorney General, Carol Federighi, Senior Litigation Counsel, Office of Immigration Litigation, Civil Division, Aaron J. Burstein, N. Christopher Hardee, UNITED

STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM.

Soo Kyang Kim, a native and citizen of South Korea, petitions for review of an order of the Board of Immigration Appeals (Board) affirming the immigration judge's denial of a motion to reopen. Kim sought rescission of a final order of removal entered in absentia. She claimed reopening was warranted because her absence was due to her failure to receive adequate notice of the hearing, and due to ineffective assistance of counsel, an exceptional circumstance beyond her control.* We deny the petition for review.

We review the Board's denial of a motion to reopen for abuse of discretion. 8 C.F.R. § 1003.2(a) (2005); INS v. Doherty, 502 U.S. 314, 323-24 (1992). A denial of a motion to reopen must be reviewed with extreme deference, since immigration statutes do not contemplate reopening and the applicable regulations disfavor motions to reopen. M.A. v. INS,

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* Kim seeks to argue in this court that counsel was ineffective in failing to accurately notify her of the need for her to attend the hearing. As this claim was not raised before the Board, we have no jurisdiction to consider the argument because Kim failed to satisfy the exhaustion requirement of 8 U.S.C. § 1252(d) (2000). See Asika v. Ashcroft, 362 F.3d 264, 267 n.3 (4th Cir. 2004), cert. denied, 125 S. Ct. 861 (2005).

899 F.2d 304, 308 (4th Cir. 1990) (en banc). We find the Board did not abuse its discretion in denying the motion.

Accordingly, we deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

JUDGMENT

FILED: December 30, 2005

[ENTERED: DECEMBER 30, 2005]

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 05-1546
A79-729-173

SOO KYANG KIM

Petitioner

v.

ALBERTO R. GONZALES,
Attorney General

Respondent

- - - - - - - -

On Petition for Review of an Order of the Board of Immigration Appeals

- - - - - - - -

In accordance with the written opinion of this Court filed this day, the Court denies the petition for review of an order of the Board of Immigration Appeals.

A certified copy of this judgment will be provided to the Agency upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

[ENTERED: APRIL 22, 2005]

Files: A79 729 173-Baltimore Date: April 22, 2005

In re: SOO KYANG KIM

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Lawrence S. Kerben, Esquire

ON BEHALF OF DHS:
Linda A. Dominguez
Assistant Chief Counsel

APPLICATION: Reopening

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano,* 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the

Immigration Judge articulated in his or her decision"). An Immigration Judge had previously ordered the respondent's removal from the United States, following the respondent's failure to appear for a hearing on April 22, 2003. The appeal will be dismissed.

On appeal the respondent asserts that the Immigration Judge applied the incorrect standard of "exceptional circumstances." She further states that when the hearing is governed by a section other than section 242B of the Act, the appropriate standard is "reasonable cause" and not "exceptional circumstances." She also contends that she demonstrated reasonable cause based on. a misunderstanding between her husband and her former attorney. However, she is not alleging ineffective assistance of counsel.

Initially, we note that the respondent is in removal proceedings under section 240(b)(5) of the Act, 8 U.S.C. § 1229a(b)(5). The respondent refers to the 'reasonable cause' standard pursuant to section 242(b) of the Act, 8 U.S.C. § 1252(b), and contends that she did not need to meet the standard of exceptional circumstances. Pursuant to *Matter of Gonzalez-Lopez,* 20 I&N Dec. 644 (BIA 1993), section 242(b) applies "where an in absentia order is made in exclusion proceedings, or in deportation proceedings following service or attempted service of the notice of a hearing, for which the alien failed to appear, made prior to June 13,1992, the effective date for the procedures specified in section 242B of the Act." Furthermore, removal proceedings conducted in absentia under section 240(b)(5) of the

Act, 8 U.S.C. § 1229a(b)(5), applies to cases in which service of the hearing notice occurs after April 1, 1997. As service of the hearing notice in the instant matter occurred after April 1, 1997, section 240(b)(5) of the Act is applicable in this case, and the respondent must establish lack of proper notice or "exceptional circumstances" for her failure to appear.

We find that proper notice was provided to the respondent. The record reflects that the notice of hearing was sent to the respondent's former attorney of record on March 18, 2003. As the respondent's attorney received notice of the hearing, proper notice was provided to the respondent. See section 240(b)(5)(A) of the Act; 8 C.F.R. § 10013.26(c)(2); *see also Matter o fBarocio,* 19 I&N Dec. 255 (BIA 1985) (holding that notice to an alien's counsel constitutes notice to the alien); 8 C.F.R. § 292.5(a). Moreover, the Immigration Judge correctly determined that the respondent failed to establish exceptional circumstances for her failure to appear. The respondent's claim that her husband misunderstood their former attorney regarding the necessity of her appearance does not amount to exceptional circumstances. Furthermore, the respondent indicates that she is not claiming ineffective assistance of counsel pursuant to *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988), *aff'd,* 857 F.2d 10 (1st Cir. 1988); *see also Matter of Assaad,* 23 I&N Dec. 553 (BIA 2003). Accordingly, the appeal is dismissed.

/s/

FOR THE BOARD

* * * F.2d 10 (1st Cir. 1988) - as the standard by which ineffective counsel is tantamount to extraordinary circumstances.

The First requirement is that (1) the motion - to reopen based on ineffective counsel via extraordinary circumstances - be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard. The Second is that (2) counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond. The Third is (3) the motion reflect whether a complaint has been filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not.

With respect to the Third Requirement, this Court, in Figeroa v. U.S. I&NS, 886 F.2d 76 (4th Cir. 1988) "failed to see how this indicates that...representation was effective. In Figeroa, the alien spoke no english and had limited education. The Court reasoned that he was "no doubt unaware of any action he might be able to take" against his counsel, "such as filing either a complaint with the state bar or a legal malpractice claim, Id at 79. This is exactly the same predicament as petitioner here. Mrs. Kim is of limited education and speaks little to no english. She would not be aware of any action she should take against her ineffective counsel.

We agree with the Fourth Circuit, in failing to see how this indicates representation was effective. The facts of the case itself are *prima facie* evidence of ineffective counsel, whether or not a complaint has been reported to the local state bar. As stipulated, Mr. Kwak never properly informed his client Kim of the need to appear at the April 22, 2003 hearing. Prior to this, counsel, on June 30, 2003, inappropriately filed a visa petition on behalf of Kim, when 8 § C.F.R 1103.3(a)(1)(iii)(B) dictates that Petitioner must do it herself (see Appendix p. 136). Then again, on July 14, 2003, Mr. Kwak inappropriately filed his motion to withdraw as Petitioner's Attorney with the Executive Office of Immigration Review; his letter was rejected because the papers should have been filed with the Appeals Board (see Appendix p. 126-127). In summary, Mr. Kwak, was, at that time, still Petitioner's representing attorney, yet was not even aware of the Appeal or the Appeals process.

With respect to the First Requirement, petitioner did not specifically filed a motion alleging ineffective counsel. However, she did submit a sworn affidavit stating her reason for failure to appear - that her counsel was unclear was to whether she had to go to the hearing with the I-130 petition still before the BIA. In Ghounam v. U.S., 378 F.3d 740, 745 (8th Cir. 2004), the Court ruled that the fact that a respondent appeared at all the hearings held prior to the missed hearing that led to an in absentia removal, is sufficient factually information to allow a sworn affidavit from respondent stating her reason for failing to appear. Mrs. Kim fulfilled this requirement. She submitted her affidavit. She had

been present at every hearing before the immigration court prior to the April 22, 2003 one. Therefore, Mrs. Kim's affidavit stating her reason for failure to appear should have been sufficient grounds for the Board to reopen her removal proceedings (see Appendix p. 118). Their failure to do so is irrational, without sufficiently stated reason, and too conclusory; the Board blindly applied the Lozada Requirements without looking at the totality of the circumstances and facts in this case.

Following the Fourth Circuit's logic in Figeroa, with respect to the Third Requirement, the same logic can be applied to the First: the failure to file a motion specifically alleging ineffective counsel, does not necessarily indicate whether counsel was indeed effective or not. Mrs. Kim spoke little to no english, and was not aware of this necessity. Furthermore, as stated, it should also be noted that Petitioner is South Korean, and it is custom to give deference to men of position like an attorney (Mr. Kwak is also South Korean); hence, Petitioner was reluctant to testify to her infective counsel as well. Hence, per Ghounam, Mrs. Kim's sworn statement, and *prima facie* evidence that she appeared before all prior hearings before the one in question should have been taken into consideration by the Board, and her removal proceedings reopened.

Finally, with respect to the Second Requirement of Lozada, in Denko v. U.S., 351 F.3d 717 (6th Cir. 2003), the court ruled that the immigration judge improperly reasoned that respondent was no entitled to reopen her proceedings solely because she failed to submit an

affidavit from her prior attorney. Again, following the logic of Figeroa, the failure of the submission itself is not necessarily entirely indicative of whether there was ineffective counsel or not. The facts clearly show infective counsel. Mrs. Kim spoke little to no english, and was not aware of the requirement. Even if she was, or later did become aware, Korean custom would inhibit her alleging ineffective counsel - and notifying her previous counsel of such. Given the totality of circumstances, the Board should have taken this into consideration in their ruling.

In addition to the Lozada Requirements, the Board in N-K & V-S stipulated that if ineffective counsel was so fundamentally unfair that the alien was prevented from reasonably presenting his case, it is considered a denial of Due Process. Id at 880. The alien must also show that she was prejudiced by her representatives performance. Matter of Lozada, supra at 638. This is obvious in the present case: if it were not for counsel Mr. Kwak's failure to properly notify his client Mrs. Kim of the hearing, Mrs. Kim would not have been deported in absentia. Mrs. Kim was prevented from reasonably presenting her case to be allowed to stay in the United States, and was prejudiced from doing so by her counsel because she was declared removed *in absentia* due to her failure to show at one of her proceeding to present such case.

II. THE DECISION OF THE BOARD OF IMMIGRATION APPEALS LACKED RATIONAL BASIS. PETITIONER'S LACK OF NOTICE IS SUFFICIENT REASON TO REOPEN REMOVAL PROCEEDINGS, UNDER 8 U.S.C.A. § 1229(b)(5)(C), AND VIOLATES HER DUE PROCESS RIGHTS UNDER THE 5TH AMENDMENT.

Pursuant to the Immigration and Nationality Act, Section 240(b)(5)(C), an in absentia order of removal may be rescinded only upon a motion to reopen filed within 180 days after the order of removal has been filed - via 8 U.S.C.A. § 1229(b)(5)(C). Petitioner's motion to reopen was timely. In order for the motion to reopen to be successful, the Petitioner must show that their failure to appear occurred because of "exceptional circumstances", or that the alien did not receive notice, was in federal custody or that the failure to appear was through no fault of the alien. Id. The Immigration and Nationality Act Section 240(e)(1) defines "exceptional circumstances" as circumstances that are beyond the control of the alien. 8 U.S.C.A. § 1229(e)(1).

Although 8 C.F.R § 292.5(a) & § 10013.26(c)(2) state notice to an alien's counsel constitutes notice to the alien, Petitioner argues her previous attorney, Mr. Kwak, did not give her notice that was served upon him for the request to appear * * *

X This office does not have jurisdiction over the Record of Proceeding. All documents must be filed with the Immigration Court that has jurisdiction over the Record of Proceeding. The court that has jurisdiction is the following:

Appeal was filed on this case. We no longer have jurisdiction. Must be sent to Board of Appeals.

__ The Immigration Court does not accept fees. All documents requiring fees must be presented to the Department of Homeland Security in your area. (DHS) will issue a receipt to the payer that shall be affixed to the document being filed with the Immigration Court

__ Motion to Reopen requires a fee of $110.00. Fee must be paid at the Department of Homeland Security/Bureau of Citizenship and Immigration Services cashier's office.

__ The court cannot schedule a removal hearing unless the Department of Homeland Security served the court with a charging document.

__ All Appeals must be filed, with a check or money order of $110.00 made payable to the Board of Immigration Appeals, Clerk's Office, Post Office Box 8530 Falls Church, VA 22041 (703) 605-1007.

__ FORM G-639, FREEDOM OF INFORMATION/PRIVACY ACT REQUEST must be filed with. The Executive Office for Immigration Review/Office of General Counsel 5107 Leesburg

Pike, Suite 2400, Falls Church, VA 22041, Attn: FOIA Unit

__ REQUEST FOR EXTENSION OF VOLUNTARY DEPARTURE must be filed with **The Bureau of Citizenship and Immigration Services/Office of The District Director** 31 Hopkins Plaza, Room 700, Baltimore, Maryland 21201 (410) 962-2010.

__ Other

A copy of our local operating procedures can be obtained by visiting the Executive Office for Immigration Review internet site at www.usdoj.gov/eoir or by requesting a paper copy at the above cited address. Information regarding individual case status and hearing dates and times may be obtained by telephone at 1-800-898-7180.

Sincerely,

/s/ L. Barrow
Legal Assistant

KWAK & ASSOCIATES
Attorney at Law

DUSIC KWAK, ESQ.
(DC, VA, KS, PATENT)

4304 Evergreen Lane, Suite 101,
Annandale, Virginia 22003 • Tel 703-658-6347 •
Fax 703-658-9807
kwakandassociates@justice.com

July 9, 2003

Intake Clerk
Executive Office of Immigration Review (EOIR)
George H. Fallon Building
31 Hopkins Plaza, Room 440
Baltimore, MD 21201

RE: Filing of Motion to Withdraw
Alien: Soo Kyung KIM
A#: A 79 729 173

Dear Clerk:

I am herein filing the following documents at this time:

1. Motion to Withdraw;
2. Order Granting Motion to Withdraw

If you have any questions or concerns please do not hesitate to contact this office.

Yours sincerely,
/s/ Dusic Kwak
Dusic Kwak, Esq.

DK/hs

United States Department of Justice
Executive Office for Immigration Review
Immigration Court
31 Hopkins Plaza Room 440
Baltimore, MD 21201

In the matter of

KIM, Soo Kyang A79-729-173

MOTION TO REOPEN

Affidavit in Support of Motion to Reopen

County of Queens
State of New York

Soo Kyang Kim, after being duly sworn, deposes and swears to the following:

My name is Soo Kyang Kim

I have read the affirmation of my attorney, Lawrence S. Kerben, and everything therein is true to my knowledge.

My husband, Brandon Lee, told me before the hearing date of April 22, 2003, that, he had spoken to my attorney at that time, Mr. Kwak, and that because my appeal was pending, I did not have to personally appear and that he would notify me of the next hearing date

I apologize for any inconvenience cause and respectfully request that the motion to reopen the matter be granted.

/s/ Soo Kyang Kim
Soo Kyang Kim

On this Tuesday, May 20, 2003, before me appeared Soo Kyang Kim, who after being duly sworn, signed the above affidavit in my presence.

Notary Public

/s/
My Commission Expires

RICHARD BRUCE ROSENTHAL
NOTARY PUBLIC, State of New York
No. 30-4700683
Qualified in ___ County
Commission Expires Jan 31 2006

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court

In REMOVAL Proceedings

Transcript of Hearing

Matter of _ _ File A 79 729 173

SOO KYANG KIM
Respondent

Before JILL H. DUFRESNE, Immigration Judge

Date: April 22, 2003 Place: Baltimore, Maryland

Transcribed by FREE STATE REPORTING, INC., at Annapolis, Maryland

Official Interpreter:

Language:

Appearances:

For the Department of Homeland Security: Melody Brukiewa

For the Respondent: Dusik Kwak

1 JUDGE FOR THE RECORD
2 This is Immigration Judge Jill H. Dufresne presiding over a

removal hearing April 22nd, year 2003, in Baltimore, Maryland in the case of Soo, S O O, Kyang, K Y A N G, Kim, K I M, A 79 729 173. The Government is represented by Ms. Melody Brukiewa, Assistant District Counsel, Baltimore, Maryland. And the respondent is represented by Mr. Dusik, D U S I K, Kwak, K W A K, Esquire. The address is 4304 Evergreen Lane, Suite 101 in Annandale, Virginia, 22003. Mr. Kwak is here, but his client is not present.

JUDGE TO MR. KWAK

Correct, Mr. Kwak?

MR. KWAK TO JUDGE

It looks like it. Your Honor. I, I had spoken with the husband of the client last week, Friday, I think, and all indications were at the time that they were going to appear, but I don't know for whatever reason they're not here today.

JUDGE TO MR. KWAK

Okay. If you wish, Mr. Kwak, we can have you wait until the end of my calendar. It, it's up to you if you want to wait.

MR. KWAK TO JUDGE

Today?

JUDGE TO MR. KWAK

Right. Or if you want, we can just go forward. The case is scheduled for 2. It's 3:20. Unless something happened. I'll leave it up to you, sir.

MR. KWAK TO JUDGE

I would, I would love to give them a — some chance, some more time. If, if, if it's at all possible, because they, they indicated to me that they would be appearing.

JUDGE TO MR. KWAK

Okay. Well, we'll put them on at the end of the calendar when, when I do my in absentias, so more time is going to be about half an hour more, you understand.

MR. KWAK TO JUDGE

Which, which would be about what time, Your Honor? Because I have to be down —

JUDGE TO MR. KWAK

I'll probably —

MR. KWAK TO JUDGE

— at the INS.

JUDGE TO MR. KWAK

I'm sorry?

MR. KWAK TO JUDGE

I have somebody else waiting for me at the INS.

JUDGE TO MR. KWAK

Okay. Well, why don't you go, Mr. Kwak. If they show up I'll tell them to wait here for you.

MR. KWAK TO JUDGE
Uh-huh.

JUDGE TO MR. KWAK
If they don't show up —
MR. KWAK TO JUDGE
Uh-huh.
JUDGE TO MR. KWAK
-- I'll go forward in, in, in —
MR. KWAK TO JUDGE
Okay.
JUDGE TO MR. KWAK
— their absence.
MR. KWAK TO JUDGE
When, when is your -- usually when do you conclude your —
JUDGE TO MR. KWAK
I appear to have either two or three cases remaining.
MR. KWAK TO JUDGE
Uh-huh.
JUDGE TO MR. KWAK
And then I'm, I'm ready to do my in absentias. So I would
say I'll probably be ready to do the in absentias in about 15
minutes.
MR. KWAK TO JUDGE
I'll try to be back by 3:35.
JUDGE TO MR. KWAK
Okay.
MR. KWAK TO JUDGE

If, if not --
JUDGE TO MR. KWAK

And I — and if they're not here by the time I'm ready,
Mr. Kwak, just to let you know I'm, I'm going to do it, okay?
MR. KWAK TO JUDGE
Yes, Your Honor.
JUDGE TO MR. KWAK
So thank you, sir. If there's no one in the courtroom when
you come back, you can just check at the window. Okay. Thank
you.
(OFF THE RECORD)
(ON THE RECORD)
JUDGE FOR THE RECORD
This is Immigration Judge Jill H. Dufresne presiding over
removal hearing April 22nd, year 2003, in Baltimore, Maryland
case of Soo Kyang Kim, A 79 729 173. The Government's
represented by Ms. Melody Brukiewa, Assistant District Counsel,
Baltimore, Maryland and as stated above the respondent
represented by Mr. Dusik Kwak. Mr. Kwak was present. He advised
that he had spoken to his clients a few days ago, thought they
would be here. The case was scheduled for 2 p.m. It is now 25
of 4 and there's been no communication to the Court as to why the
respondent's not present. The Court must proceed in absentia.

There is a Notice to Appear, which has been marked into evidence as Exhibit No. 1. The respondent before another Judge had admitted allegations 1 through 3, denied number 4. That Judge found the respondent to be removable as charged. The respondent did not designate a country of removal should that become necessary, and the Court will designate South Korea. Based on the prior finding of removability, this Court has no choice but to order that respondent be removed and deported from the United States to South Korea.

JUDGE TO MS. BRUKIEWA

Is that a final order, Ms. Brukiewa?

MS. BRUKIEWA TO JUDGE

Final.

JUDGE FOR THE RECORD

The hearing is closed.

HEARING CLOSED

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE JILL H. DUFRESNE, in the matter of:

S00 KYANG KIM
A 79 729 173
Baltimore, Maryland

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Donna L. Manning/CB
Donna L. Manning, Transcriber

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

January 13, 2004
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

just — we still have —
JUDGE TO MR. KWAK
Okay. Well, if you're asking me to continue this case
pending the BIA decision, Mr. Kwak —
MR. KWAK TO JUDGE
Exactly.
JUDGE TO MR. KWAK
— I'm not going to do that. That I won't do. So what
alternative relief, then, will you be seeking on behalf of your
client?
MR. KWAK TO JUDGE
Well, we would like to renew our application for adjustment
before Your Honor.
JUDGE TO MR. KWAK
But we have no I-130, sir. We have no approved — we have
no basis to adjust her status. And now I'm, I'm — what else are
you seeking?
MR. KWAK TO JUDGE
Well, actually we — I was under the impression that we were
going to get another continuance pending the notice, so I have
not had an occasion to talk to my client regarding what she's
seeking. I have a pretty good idea what she can get, but I
really need to talk to her. If we are to proceed today, if you

would give us a few minutes.
JUDGE TO MR. KWAK

Fifth Amendment - Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. § 1229

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided

(i) a period of time to secure counsel under subsection (b)(1) of this section and

(ii) a current list of counsel prepared under subsection (b)(2) of this section.

(F)

(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a (b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)

(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a (b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying—

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a (b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers

(and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) of this section and otherwise made generally available.

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery

to the last address provided by the alien in accordance with subsection (a)(1)(F) of this section.

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

8 U.S.C. § 1252

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225 (b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225 (b)(1)

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225 (b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225 (b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225 (b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182 (h), 1182 (i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158 (a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal

offense covered in section 1182 (a)(2) or 1227 (a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227 (a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227 (a)(2)(A)(i) of this title.

(3) Treatment of certain decisions
No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a (c)(1)(B) of this title.

(b) Requirements for review of orders of removal
With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline
The petition for review must be filed not later than 30 days after the date of the final order of removal.
(2) Venue and forms
The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review
Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,
(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,
(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and
(D) the Attorney General's discretionary judgment whether to grant relief under section 1158 (a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact
If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253 (a) of this title may challenge the validity

of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

> **(i)** no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or
>
> **(ii)** a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation
If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253 (a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review
The defendant in a criminal proceeding under section 1253 (a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction
This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231 (a) of this title;
(B) does not relieve the alien from complying with section 1231 (a)(4) of this title and section 1253 (g) [1] of this title; and
(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review
Judicial review of all questions of law and fact, including interpretation and

application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225 (b)(1)

(1) Limitations on relief
Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225 (b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or
(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings
Judicial review of any determination made under section 1225 (b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,
(B) whether the petitioner was ordered removed under such section, and
(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has

been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225 (b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225 (b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions
Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal
A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases
It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision
In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225 (b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section

1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225 (b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and

Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

§ 292.5 Service upon and action by attorney or representative of record.

(a) *Representative capacity.* Whenever a person is required by any of the provisions of this chapter to give or be given notice; to serve or be served with any paper other than a warrant of arrest or a subpoena; to make a motion; to file or submit an application or other document; or to perform or waive the performance of any act, such notice, service, motion, filing, submission, performance, or waiver shall be given by or to, served by or upon, made by, or requested of the attorney or representative of record, or the person himself if unrepresented.

(b) *Right to representation.* Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs. Provided, that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.

§ 1003.26 In absentia hearings.

(a) In any exclusion proceeding before an Immigration Judge in which the applicant fails to appear, the Immigration Judge shall conduct an in absentia hearing if the Immigration judge is satisfied that notice of the time and place of the proceeding was provided to the applicant on the record at a prior hearing or by written notice to the applicant or to the applicant's counsel of record on the charging document or at the most recent address in the Record of Proceeding.

(b) In any deportation proceeding before an Immigration Judge in which the respondent fails to appear, the Immigration Judge shall order the respondent deported in absentia if: (1) The Service establishes by clear, unequivocal and convincing evidence that the respondent is deportable; and

(2) The Immigration Judge is satisfied that written notice of the time and place of the proceedings and written notice of the consequences of failure to appear, as set forth in section **242B(c)** of the Act (8 U.S.C. 1252b(c)), were provided to the respondent in person or were provided to the respondent or the respondent's counsel of record, if any, by certified mail.

(c) In any removal proceeding before an Immigration Judge in which the alien fails to appear, the Immigration Judge shall order the alien removed in absentia if: (Paragraph (c) revised effective 4/1/97; **62 FR 10312**)

(1) The Service establishes by clear, unequivocal, and convincing evidence that the alien is removable; and

(2) The Service establishes by clear, unequivocal, and convincing evidence that written notice of the time and place of proceedings and written notice of the consequences of failure to appear were provided to the alien or the alien's counsel of record. (Corrected 4/1/97; **62 FR 15362**)

(d) Written notice to the alien shall be considered sufficient for purposes of this section if it was provided at the most recent address provided by the alien. If the respondent fails to provide his or her address as required under § 1003.15(d), no written notice shall be required for an Immigration Judge to proceed with an in absentia hearing. This paragraph shall not apply in the event that the Immigration Judge waives the appearance of an alien under § **1003.25**. (Paragraph (d) added effective 4/1/97; **62 FR 10312**)

§ 1103.3 Denials, appeals, and precedent decisions.

(a) *Denials and appeals*—(1) *General*—(i) *Denial of application or petition.* When a Service officer denies an application or petition filed under §103.2 of this part, the officer shall explain in writing the specific reasons for denial. If Form I–292 (a denial form including notification of the right of appeal) is used to notify the applicant or petitioner, the duplicate of Form I–292 constitutes the denial order.

(ii) *Appealable decisions.* Certain unfavorable decisions on applications, petitions, and other types of cases may be appealed. Decisions under the appellate jurisdiction of the Board of Immigration Appeals (Board) are listed in §1003.1(b) of this chapter. Decisions under the appellate jurisdiction of the Associate Commissioner, Examinations, are listed in §1103.1(f)(2) of this part.

(iii) *Appeal*—(A) *Jurisdiction.* When an unfavorable decision may be appealed, the official making the decision shall state the appellate jurisdiction and shall furnish the appropriate appeal form.

(B) *Meaning of affected party.* For purposes of this section and §§1103.4 of this part and 103.5 of 8 CFR chapter I, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. An affected party may be represented by an attorney or representative in accordance with part 1292 of this chapter.

(C) *Record of proceeding.* An appeal and any cross-appeal or briefs become part of the record of proceeding.

(D) *Appeal filed by Service officer in case within jurisdiction of Board.* If an appeal is filed by a Service officer, a copy must be served on the affected party.

(iv) *Function of Administrative Appeals Unit (AAU).* The AAU is the appellate body which considers cases under the appellate jurisdiction of the Associate Commissioner, Examinations.

(v) *Summary dismissal.* An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. The filing by an attorney or representative accredited under 8 CFR 1292.2(d) of an appeal which is summarily dismissed under this section may constitute frivolous behavior as defined in 8 CFR 1292.3(a)(15). Summary dismissal of an appeal under §1103.3(a)(1)(v) in no way limits the other grounds and procedures for disciplinary action against attorneys or representatives provided in 8 CFR 1292.2 or in any other statute or regulation.

(2) *AAU appeals in other than special agricultural worker and legalization cases*—(i) *Filing appeal.* The affected party shall file an appeal on Form I–290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by §1103.7 of this part. The affected party shall file the complete

appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision.

(ii) *Reviewing official.* The official who made the unfavorable decision being appealed shall review the appeal unless the affected party moves to a new jurisdiction. In that instance, the official who has jurisdiction over such a proceeding in that geographic location shall review it.

(iii) *Favorable action instead of forwarding appeal to AAU.* The reviewing official shall decide whether or not favorable action is warranted. Within 45 days of receipt of the appeal, the reviewing official may treat the appeal as a motion to reopen or reconsider and take favorable action. However, that official is not precluded from reopening a proceeding or reconsidering a decision on his or her own motion under §103.5(a)(5)(i) of 8 CFR chapter I in order to make a new decision favorable to the affected party after 45 days of receipt of the appeal.

(iv) *Forwarding appeal to AAU.* If the reviewing official will not be taking favorable action or decides favorable action is not warranted, that official shall promptly forward the appeal and the related record of proceeding to the AAU in Washington, DC.

(v) *Improperly filed appeal*—(A) *Appeal filed by person or entity not entitled to file it*—*(1) Rejection without refund of filing fee.* An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any

filing fee the Service has accepted will not be refunded.

(2) *Appeal by attorney or representative without proper Form G–28—(i) General.* If an appeal is filed by an attorney or representative without a properly executed Notice of Entry of Appearance as Attorney or Representative (Form G–28) entitling that person to file the appeal, the appeal is considered improperly filed. In such a case, any filing fee the Service has accepted will not be refunded regardless of the action taken.

(*ii*) *When favorable action warranted.* If the reviewing official decides favorable action is warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G–28 to the official's office within 15 days of the request. If Form G–28 is not submitted within the time allowed, the official may, on his or her own motion, under §103.5(a)(5)(i) of 8 CFR chapter I, make a new decision favorable to the affected party without notifying the attorney or representative.

(*iii*) *When favorable action not warranted.* If the reviewing official decides favorable action is not warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G–28 directly to the AAU. The official shall also forward the appeal and the relating record of proceeding to the AAU. The appeal may be considered properly filed as of its original filing date if the attorney or representative

submits a properly executed Form G–28 entitling that person to file the appeal.

(B) *Untimely appeal—(1) Rejection without refund of filing fee.* An appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

(2) *Untimely appeal treated as motion.* If an untimely appeal meets the requirements of a motion to reopen as described in §103.5(a)(2) of this part or a motion to reconsider as described in §103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

(vi) *Brief.* The affected party may submit a brief with Form I–290B.

(vii) *Additional time to submit a brief.* The affected party may make a written request to the AAU for additional time to submit a brief. The AAU may, for good cause shown, allow the affected party additional time to submit one.

(viii) *Where to submit supporting brief if additional time is granted.* If the AAU grants additional time, the affected party shall submit the brief directly to the AAU.

(ix) *Withdrawal of appeal.* The affected party may withdraw the appeal, in writing, before a decision is made.

(x) *Decision on appeal.* The decision must be in writing. A copy of the decision must be served on the affected party and the attorney or representative of record, if any.

(3) *Denials and appeals of special agricultural worker and legalization applications and termination of lawful temporary resident status under sections 210 and 245A.* (i) Whenever an application for legalization or special agricultural worker status is denied or the status of a lawful temporary resident is terminated, the alien shall be given written notice setting forth the specific reasons for the denial on Form I–692, Notice of Denial. Form I–692 shall also contain advice to the applicant that he or she may appeal the decision and that such appeal must be taken within 30 days after service of the notification of decision accompanied by any additional new evidence, and a supporting brief if desired. The Form I–692 shall additionally provide a notice to the alien that if he or she fails to file an appeal from the decision, the Form I–692 will serve as a final notice of ineligibility.

(ii) Form I–694, Notice of Appeal, in triplicate, shall be used to file the appeal, and must be accompanied by the appropriate fee. Form I–694 shall be furnished with the notice of denial at the time of service on the alien.

(iii) Upon receipt of an appeal, the administrative record will be forwarded to the Administrative Appeals Unit as provided by §103.1(f)(2) of this part for review and decision. The decision on the appeal shall be in writing, and if the appeal is dismissed,

shall include a final notice of ineligibility. A copy of the decision shall be served upon the applicant and his or her attorney or representative of record. No further administrative appeal shall lie from this decision, nor may the application be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings.

(iv) Any appeal which is filed that:

(A) Fails to state the reason for appeal;

(B) Is filed solely on the basis of a denial for failure to file the application for adjustment of status under section 210 or 245A in a timely manner; or

(C) Is patently frivolous; will be summarily dismissed. An appeal received after the thirty (30) day period has tolled will not be accepted for processing.

(4) *Denials and appeal of Replenishment Agricultural Worker petitions and waivers and termination of lawful temporary resident status under section 210A.* (i) Whenever a petition for Replenishment Agricultural Worker status, or a request for a waiver incident to such filing, is denied in accordance with the provisions of part 210a of this title, the alien shall be given written notice setting forth the specific reasons for the denial on Form I–692, Notice of Denial. Form I–692 shall also contain advice to the alien that he or she may appeal the decision and that such appeal must be taken within thirty (30) days after service of the notification of

decision accompanied by any additional new evidence, and a supporting brief if desired. The Form I–692 shall additionally provide a notice to the alien that if he or she fails to file an appeal from the decision, the Form I–692 shall serve as a final notice of ineligibility.

(ii) Form I–694, Notice of Appeal, in triplicate, shall be used to file the appeal, and must be accompanied by the appropriate fee. Form I–694 shall be furnished with the notice of denial at the time of service on the alien.

(iii) Upon receipt of an appeal, the administrative record will be forwarded to the Administrative Appeals Unit as provided by §103.1(f)(2) of this part for review and decision. The decision on the appeal shall be in writing, and if the appeal is dismissed, shall include a final notice of ineligibility. A copy of the decision shall be served upon the petitioner and his or her attorney or representative of record. No further administrative appeal shall lie from this decision, nor may the petition be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings.

(iv) Any appeal which is filed that: Fails to state the reason for the appeal; is filed solely on the basis of a denial for failure to file the petition for adjustment of status under part 210a of this title in a timely manner; or is patently frivolous, will be summarily dismissed. An appeal received after the thirty (30) day period has tolled will not be accepted for processing.

(b) *Oral argument regarding appeal before AAU*—(1) *Request.* If the affected party desires oral argument, the affected party must explain in writing specifically why oral argument is necessary. For such a request to be considered, it must be submitted within the time allowed for meeting other requirements.

(2) *Decision about oral argument.* The Service has sole authority to grant or deny a request for oral argument. Upon approval of a request for oral argument, the AAU shall set the time, date, place, and conditions of oral argument.

(c) *Service precedent decisions.* The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause such decisions to be published in the same manner as decisions of the Board and the Attorney General. In addition to Attorney General and Board decisions referred to in §1003.1(g) of chapter V, designated Service decisions are to serve as precedents in all proceedings involving the same issue(s). Except as these decisions may be modified or overruled by later precedent decisions, they are binding on all Service employees in the administration of the Act.

Precedent decisions must be published and made available to the public as described in §103.9(a) of this part.